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No. 02-626

In the
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari. Written consent for amicus participation in this case was granted by counsel of record for Petitioner and Respondent Friends of the Everglades. Consent was withheld by Respondent Miccosukee Tribe of Indians.[1]

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated as amicus curiae in numerous cases before this Court concerning the statutory interpretation and constitutional application of a variety of federal environmental statutes including the Clean Water Act. For example, PLF participated as amicus curiae in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

167 (2000); *Hanousek v. United States*, 528 U.S. 1102 (2000); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and is appearing as amicus curiae before the Court this term in several cases, including *Borden Ranch Partnership v. United States Army Corps of Engineers, cert. granted*, 122 S. Ct. 2355 (2002).

PLF seeks to augment the arguments of Petitioner by providing additional perspective and background on the regulatory scheme that is the subject of this petition. For nearly 30 years, PLF attorneys have represented numerous parties from the agricultural, home building, forestry, and related industries who must comply with the strictures of the point source and nonpoint source permitting provisions of the Clean Water Act. It is imperative that the interpretation and enforcement of these provisions be uniformly applied across the country, but as this case points out, that is not happening. In fact, this case raises the possibility that hundreds of thousands of water diversion facilities, never before thought to need point source discharge permits, will not be able to operate without building and operating very expensive water treatment systems.

PLF believes its public policy perspective and litigation experience dealing with clean water issues will provide a valuable viewpoint on the issues presented in this case and will aid this Court in evaluating the merits of the Petition.

For all the foregoing reasons, Pacific Legal Foundation's motion to file a brief amicus curiae should be granted.

DATED: November, 2002.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

2. Whether the court below should have deferred to the consistent and long-held federal and state agency position that the SFWMD's pumping does not constitute an "addition" that requires a National Pollutant Discharge Elimination System permit.

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INTRODUCTION

This case raises an important question that will affect municipalities, flood control agencies, water districts, dam operators, and all other entities that are involved in managing water flows for the benefit and protection of society. Must these entities obtain restrictive federal Clean Water Act "point source" discharge permits in order to do their jobs? Because of the Eleventh Circuit's decision in this case that they must, the ability of these entities to provide such a critical public service is in jeopardy.

OVERVIEW OF THE CLEAN WATER ACT'S STRUCTURE TO CLEAN UP THE NATION'S WATERS

The Clean Water Act's primary goal is to "restore and maintain the chemical, physical, and biological integrity of the Nations's waters." 33 U.S.C. § 1251(a). The Act seeks to eliminate pollution and the discharge of pollutants into navigable waters. In designing the program to accomplish this goal, the Act recognizes two different sources of pollution, point sources and nonpoint sources. The Clean Water Act defines a point source as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Exempted are agricultural stormwater discharges and irrigated agricultural return flows. *Id.* Nonpoint sources are not defined by the Act, but are considered to be all other sources of pollution that are not regulated under the point source definition. A nonpoint source refers to "disparate runoff caused primarily by rainfall around activities that employ or cause pollutants." *United States v. Earth Sciences*, 599 F.2d 368, 373 (10th Cir. 1979). *See also* Bartfeld, Esther, *Point—Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 Envtl L. 43, 45 n.6 (1993).

Under the Act, a nonexempt, point source discharger of a pollutant into the nation's waters is required to obtain a

National Pollutant Discharge Elimination System permit in order to legally operate. 33 U.S.C. § 1311. The permit establishes effluent limitations and stipulates specific terms and conditions of discharge that are based on available technology and water quality standards. 33 U.S.C. § 1342, 40 C.F.R. §§ 122-124 (2002). Dischargers are required to publicly disclose the nature and volume of their discharges in reports which provide the basis for enforcement against noncomplying dischargers. 33 U.S.C. § 1318(a), 40 C.F.R. § 122.41(j). *See also* 33 U.S.C. § 1365 (authorizing citizen suits to enforce CWA violations). Many states administer the NPDES permitting program with federal EPA oversight, as does Florida. Fla. Stat. § 403.0885.

Nonpoint source pollution requires a different set of solutions since it is not readily attributable to easily identifiable outlets. In an example of cooperative federalism, Congress gave states the authority and responsibility to manage nonpoint source pollution. States are to develop areawide waste treatment management plans, 33 U.S.C. § 1288, that are to direct changes in local land use practices and other local behaviors that cause nonpoint source pollution. Section 319 of the Act, 33 U.S.C. § 1329, encourages states to identify best management practices (BMPs) to reduce pollutant loading and employ them in establishing their management programs for water bodies to achieve water quality standards developed by the states. 33 U.S.C. § 1329(a), (b). Section 319 also supports development of management plans through a federal grant program to the states. 33 U.S.C. § 1329(h).

Nonpoint source pollution is also addressed in section 303(d) of the Act. 33 U.S.C. § 1313(d).

> In short, section 303(d) . . . requires states to 1) identify waters that are and will remain polluted after the application of technology standards (i.e., the NPDES program), 2) prioritize the waters, taking into account the severity of their pollution, and 3) establish total maximum daily loads for the waters at levels necessary to meet applicable water quality standards.

Vergura, Jim & Jones, Ron, *The TMDL Program: Land Use and Other Implications*, 6 Drake J. Agric. L. 317, 320 (2001). The term "load" refers to pollution from both point and nonpoint sources. 40 C.F.R. § 130.2(e) (2000). The state is then to incorporate its list of impaired water bodies and TMDLs into its continuing clean water planning process.[1] 33 U.S.C. § 1313(d)(3), (e). Through this process, the states are an integral partner with the federal regulators in a mutual effort to provide clean waters in our nation.

STATEMENT OF FACTS

Florida is a state that has a complex hydrological landscape.[2] The state has vast areas that are or have been naturally inundated. The only way these areas have been made functional and habitable has been to empower governmental agencies to control the movement and placement of water. The Petitioner in this case, the South Florida Water Management District (District or SFWMD), is the largest of five regional water management districts in the state charged with providing vital flood protection. Fla. Stat. § 373.069. The District "is responsible for the Lake Okeechobee watershed, an immense, integrated and unique system of hydrologically connected lakes, rivers, bays and surface waters . . . . Fla. Stat. § 373.4595. Within this watershed lie populous municipalities, vast

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[1] The Ninth Circuit decision, *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002), ruled recently that the 303(d) program applies to all water bodies that have not met water quality standards, even those polluted only by nonpoint sources. *Id.* at 1140-41.

[2] *See* Purdum, Elizabeth D., *Florida Waters: A Water Resources Manual from Florida's Water Management Districts* (2002).

agricultural communities, and precious resources, including Florida's Everglades." Petition for Writ of Certiorari (Pet.) at 8-9.

The Lake Okeechobee watershed is a 16 county area from Orlando to Key West and is managed by a United States Army Corps of Engineers' project known as the Central & Southern Florida Flood Control Project (C&SFFCP). Fla. Stat. § 373.1501. The Project consists of a system of levees, canals, water impoundment areas, and flow diversion facilities for controlling the movement, flow, and circulation of water. The Project is operated today by the District under Corps of Engineers' oversight and guidelines. *Id.*, Pet. at 9.[3]

This case arose as a result of the District's federally overseen and approved operation of the Project. As part of the Project, the District must manage the flow of water across the watershed to keep some areas from flooding and ensure other areas receive supplies of water.

The areas now called the C-11 Basin and Water Conservation Area - 3A (WCA-3A) were historically part of the Everglades. In the early 1900's, the Army Corps of Engineers constructed the C-11 Canal to facilitate the draining of the 48,000-acre, western portion of Broward County which is part of the C-11 Basin. Later, the Corps constructed the L-33 and L-37 levees to create the separate 491,000-acre Water Conservation Area-3A to the west of the C-11 Basin and also completed construction of the S-9 pump station. *See Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364, 1366 (11th Cir. 2002).

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[3] This Project is huge. It involves 391 water diversion structures consisting of pumping stations incorporated with 1,800 miles of canals and levees. Pet. at 4; http://www.sfwmd.gov/histo/2_history.html at 1 (last visited Nov. 13, 2002). The Project controls water flow over 17,930-square miles of land in Florida. *Id.*

The C-11 Canal runs through the C-11 West Basin. It collects water runoff from this area and seepage coming through the levees from WCA-3A. The S-9 station then pumps this water through three pipes from the C-11 Canal through the L-33 and L-37 levees into WCA-3A and prevents the heavily populated western portion of Broward County from flooding. Without this system, it would flood within days. *Id.*

The movement of water collected by the C-11 Canal to WCA-3A is the basis for the lawsuit now before this Court. The water collected on the east side of L-33 and L-37, the C-11 Basin side, has a higher phosphorous content than the west side, the WCA-3A side. Apparently unhappy with the "eight billion-dollar joint federal and state effort to re-plumb the C&SFFCP to restore the everglades while accommodating the region's competing urban and agricultural interests," Pet. at 9, the Miccosukee Tribe of Indians and the Friends of the Everglades, Inc., challenged the water diversion activities of S-9 as illegally operating without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342. *See Miccosukee*, 280 F.3d at 1367. The district court and the Eleventh Circuit Court of Appeals agreed with Plaintiffs, and in so doing have created great confusion and unsettling conflict among the circuits as to when an NPDES permit is required. They have also set the stage for federalizing the management of local surface water flows and the local land uses that accompany such management in blatant contradiction of the express terms of the CWA. *See* 33 U.S.C. § 1324(f)(2)(F).

State and regional water management agencies, local water districts, municipalities, dam operators, agricultural operations, and any other entity concerned with the necessary movement of water for flood control and water management purposes are faced with having to obtain an economically costly, highly

restrictive, federal permit to operate.[4] This was never intended by the CWA and, if not addressed by this Court, effective water diversion and flood protection activities of Florida's five regional water districts will be subjected to oppressive NPDES permitting rules and restrictions.

SUMMARY OF ARGUMENT

The NPDES program of the Clean Water Act forbids the discharge of any pollutant from a point source into the nation's waters without a permit. The SFWMD employs numerous pumping plants and a thousand-mile system of ditches and levees to control water flow across the landscape. These dam-like water diversion facilities move water from area to area to prevent flooding and provide water for consumptive purposes. They themselves add no pollutants to the water yet the Eleventh Circuit decision below has created a schism between the circuits ruling that if water on one side of a pumping plant contains a pollutant and the receiving side does not, the pumping plant may not divert the water without an NPDES permit. Other circuits have ruled when a dam or dam-like facility merely moves water from one side of the dam to the other, without the facility adding a pollutant, it does not need an NPDES permit. If not addressed and overturned, this decision could cause serious operational and economic problems for hundreds of thousands of dam, and dam-like, facilities in this country that prior to this decision did not require such permits.

Additionally, the Clean Water Act is clear that water diversion activities like those in this case are to be regulated as part of the nonpoint source pollution control program of the Act. The Clean Water Act left to the states their traditional responsibilities to control land use and manage water supply.

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[4] *See* EPA NPDES Permit Writers Manual, Chapter 5, Technology-Based Effluent Limits for the complexity of considerations that go into developing technology based effluent limitations for both nonmunicipal and municipal discharges.

This decision circumvents Congress's express will and abrogates to EPA that role. For these very important reasons, this Court should grant certiorari.

ARGUMENT

I

THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A SIGNIFICANT CONFLICT AMONG THE CIRCUITS

A. The Eleventh Circuit's Decision Has Resulted in Unsettling Confusion

Confronted with the question of whether the District's operation of the S-9 water diversion system required an NPDES permit, the Eleventh Circuit reached the decision that the District must obtain an NPDES permit to continue its flood protection activities with regard to western Broward County and the heavily populated C-11 West Basin. It reasoned that the District's diversion of water from one side of flood control levees L-33 and L-37 to the other constituted the discharge of a pollutant from a point source into navigable waters needing a permit. *Miccosukee*, 280 F.3d at 1367.

The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The court found that the primary dispute in the case was not whether the S-9 station involved a point source (the pipes through the levees), or whether the water that drained into WCA-3A contained a pollutant (the phosphorous), but whether the movement of the phosphorous rich water from one side of a levee (a form of dam) to the other into water that did not have the increased level of phosphorous, constituted an "addition" of a pollutant to navigable waters from a point source. The court found that this movement did constitute an "addition" requiring a permit.

The Eleventh Circuit's decision in this case applied a rarely used paradigm for determining whether a water diversion facility like a reservoir/dam system, or a levee/pumping system like S-9 and L-33/L-37, requires an NPDES permit. Instead of determining whether the system itself adds a pollutant and whether the relevant water bodies essentially make up one larger water body, the court used another model. Under it, the court found a point source must have a permit if the receiving body of water would not have received the pollutant had the point source not been in operation. In other words, "the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." 280 F.3d at 1368. In using this test, the court declined to accept the positions of the Fourth, Sixth, Seventh, and D.C. Circuits as to when an addition of a pollutant occurs in the operation of water diversion and management facilities and instead adopted the completely contrary "but for" analysis only appropriate for other circumstances.

The court instead relied on distinguishable decisions stating: "Our conclusion is consistent with the views of the First and Second Circuits." In *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), the First Circuit concluded that the piping of water from the polluted East Branch River for commercial use and its proposed release into the upstream Loon Lake would constitute an addition of pollutants from a point source. *Id.* at 1296-99. Then, in *Catskill Mountains*, the Second Circuit concluded that the diversion of water from a reservoir containing pollutants by tunnel into a creek for which the reservoir was not naturally a source would constitute an addition of pollutants from a point source. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001). "Both courts emphasized that the two bodies of water were separate and that pollutants would not enter the second body except for the point source." *Miccosukee*, 280 F.3d at 1369 n.7.

Unfortunately, the court did not recognize the facts of *Dubois* and *Catskill* do not fit *Miccosukee* and other dam or levee water management cases where the water bodies are contiguous. This lack of recognition has not only created circuit conflicts as described below, but has even caused confusion within the Eleventh Circuit itself.

The court recently faced again the question of whether a water management system required an NPDES permit. In *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002), irrigation return flows were discharged into Lake Okeechobee. Although the "CWA specifically exempts 'agricultural stormwater discharges and return flows from irrigation agriculture' from the definition of a point source," *id.* at 1297, 33 U.S.C. § 1362(14), the court had to decide whether nonagricultural discharges from adjoining property that flowed onto Closter Farms and discharged with irrigation runoff into the lake negated the NPDES permit exemption. Initially the district court found in a pre-*Miccosukee* decision that any pollutants that originated off the farm did not need a permit because they emanated from other discharges that are "either the subject of existing NPDES permits or are exempted from NPDES permitting [e.g., nonpoint source discharges such as runoff from adjoining county roads.]" *Closter Farms*, 300 F.3d at 1298. However, confronted with the Eleventh Circuit's decision in *Miccosukee*, which expressly declined to follow the widespread precedent that an NPDES permit is not required unless the point source system itself adds the pollutant to the water, the *Closter Farms* panel of the Eleventh Circuit instead avoided the controversy and made the unconvincing finding of insufficient evidence in the record to support a conclusion that nonagricultural runoff was being discharged. *Id.* Clearly this Eleventh Circuit panel was unsettled by *Miccosukee*, and found itself creating factual distinctions to avoid its implications.

Such confusion and internal discord needs to be settled by this Court.

B. Other Circuits Have Declined to Require NPDES Permits for Similarly Situated Water Diversion Facilities

1. District of Columbia

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the circuit court considered whether the operations of a dam must obtain NPDES permits. The court addressed the question of whether "certain dam-induced water quality changes," *id.* at 161, constitute the "discharge of a pollutant." *Id.* Specifically, by damming streams reservoirs are created upstream for the purposes, among others, of preventing flooding, storing drinking and irrigation water, providing a source of electric power, and moderating water flow. Damming can also cause the levels of pollutants such as sediment and dissolved minerals and nutrients to increase in the reservoir's water which, when released downstream through the piping system of the dam's structure, can change the quality of the water below the dam. Faced with the question of whether such an operational activity of dams involves "the discharge of any pollutant," 33 U.S.C. § 1311(a), because it causes the "*addition* of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12) (emphasis added), the court accepted EPA's reasoning that "the . . . character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)." 693 F.2d at 175. Of course, as with the instant case, water above the dam, and that below the dam, all comes from one contiguous, connected water body.

2. Sixth Circuit

In *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988), the circuit court

considered whether an NPDES permit was required for the operation of a hydroelectric facility that pumps water out of Lake Michigan up hill to a man-made reservoir that later releases its water downhill through huge penstocks and electricity generating turbines and then back into the Lake. In the process, the pumping of lake water to the reservoir also pulled up fish with it. When the water and fish were later dropped back through the penstocks and this time through the turbines, not only the water, but "entrained fish (live and dead fish, and fish remains)," *id.* at 581, were discharged back into Lake Michigan. Accepting the fact that the fish remains constituted a pollutant, the court was faced with the question of whether their discharge constituted the "addition of a pollutant" requiring an NPDES permit. The court followed the *Gorsuch* precedent finding that a hydroelectric power dam could indeed add pollutants from the outside to navigable waters "by tangential processes in generating electricity," *id.* at 586, thus requiring a permit, but "the fish, both dead and alive, always remain within the waters of the United States, and hence cannot be added." *Id.* Thus, "those pollutants already in the water (not added by the dam's operation) moved and transformed by the essential operation of the hydroelectric power dam," *id.*, do not require an NPDES permit. The court once again found no essential "addition of a pollutant" where the activity involved the diversion of water between two contiguous water bodies, indeed two bodies that were originally one, and there was no introduction of a pollutant in the operation of the water diversion facilities. These operational facts are parallel to the instant case.

3. Fourth Circuit

In *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976), the circuit court dealt with a challenge to regulations establishing limitations on the discharge of heat from steam electric generating plants into navigable waters. Industry argued the effluent limitations in the regulations

created absolute standards that applied regardless of the pollutants in a plant's intake water. *Id.* at 1377. The court agreed that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass," *id.*, and accordingly do not constitute a regulable "discharge of a pollutant." *Id.* Thus, the circuit court found that a pollutant not introduced by the operation of the point source (e.g., dam, hydroelectric facility, water diversion pump and levee complex) did not constitute the discharge of a pollutant subject to a NPDES permit.

4. Seventh Circuit

In *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), the circuit court declined to require a permit for downstream flow of sediment captured above an instream dam when the weathered and damaged dam was removed by the state. Although the court rejected the plaintiff's premise that removing a dam could create a point source of pollution, it nevertheless reached a similar conclusion to the circuits above in finding that if a point source discharges a pollutant into a pond, the fact that the pollutant then travels down stream from one tributary to another does not make each confluence a new point source subject to an NPDES permit. *Id.* at 938. This is analogous to the above circuits' conclusions that a facility that directs polluted water from one contiguous water body to another without itself adding a pollutant, is also not subject to NPDES permitting requirements.

C. The Ninth Circuit Has Required NPDES Permits for Similarly Situated Water Diversion Facilities

In *Committee To Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993), the circuit court addressed whether water with high levels of acid that drained as natural surface runoff from a mine into adjacent navigable waters could constitute an "addition of a pollutant"

requiring an NPDES permit when it was first collected in an attempt to clean it up. Owners of the mine had constructed a dam to impound the acid drainage, and keep it from discharging into the adjacent river and reservoir until purified through a system of evaporation ponds, but at times, the water "passed over the spillway . . . into the Mokelumne River." *Id.* at 308. The court found that this discharge did constitute an "addition" of a pollutant requiring an NPDES permit, but in doing so, it attempted to distinguish the case from *Gorsuch* and *Consumers Power* finding that the water diversion operation involved with the mine "does not pass pollution from one body of navigable water to another." *Id.* The court's distinction is unpersuasive, however, as the water running through the mine site originally flowed into the Hinkley Run and Mine Run Creeks which flow into the Mokelumne River. The owner of the mine created a dam and impoundment system to try to eliminate these original nonpoint source pollutants prior to entering the Mokelumne. Thus, the water passed from one side of the dam to the other from "one body of navigable water to another." Accordingly, this case clearly conflicts with the D.C., Sixth, Fourth, and Seventh Circuits. The case also conflicts with the position of the D.C., Sixth, Fourth, and Seventh Circuits that pollutants not generated by the operation of the water diversion facility, such as pollutants occurring naturally in the water or by virtue of authorized nonpoint source activities, do not constitute an *addition* of a pollutant when diverted into adjacent navigable waters.

Thus, the Eleventh Circuit's decision in this case highlights a significant conflict between the circuits as well as confusion with the Eleventh Circuit itself. This Court should grant the writ of certiorari to eliminate the conflict and clear up the confusion.

II

THE ELEVENTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION—IS CWA'S NPDES PROGRAM INTENDED TO APPLY TO FLOOD CONTROL AND WATER DIVERSION FACILITIES AND THEREBY MARGINALIZE CWA'S NONPOINT SOURCE MANAGEMENT SCHEME?

The CWA legislates two principal methods to clean the nation's waters. The first is to eliminate pollutants from being discharged from point sources into the waters. 33 U.S.C. § 1311. The second was to reduce pollutants from nonpoint sources of pollution by the development of areawide waste treatment plans, 33 U.S.C. §§ 1288, 1329, and the imposition of total maximum daily loads of pollutants and plans to control them in waterbodies where those pollutants exceed state imposed water quality standards. 33 U.S.C. § 1333(d).

NPDES permits are required for point source discharges, which include principally municipal and industrial wastewater outflows. The permit is designed to get toxins out of the water and generally requires the discharger to reduce discharges to the maximum extent technology will allow. 33 U.S.C. § 1311(b), (c), *see EPA v. California*, 426 U.S. 200, 204 (1976). If flood control and water flow management facilities are indeed covered by this CWA provision, as the Eleventh Circuit ruled in this case, the national costs will be astronomical. The Corps of Engineers' National Inventory of Dams indicates that approximately 77,000 dams are currently on its inventory list. http://crunch.tec.army.mil/nid/webpages/nidintroduction.html (last visited Nov. 13, 2002). If you add to that total the number of local, regional, and state water management operations that also serve to protect against flooding and provide water supplies, we are dealing with a huge number of facilities. Imposing new NPDES permitting requirements for so many facilities, never before thought to need such permits, will be a

slow, ponderous, logistically difficult, monumentally costly project.

One would expect Congress to clearly express its intent to impose such requirements on mere water diversion mechanisms, but such expression is found nowhere in the CWA. In fact, the language of the CWA requires no such thing, but instead recognizes that any pollutants associated with such water diversion facilities will be attacked through the CWA's system for controlling nonpoint source pollution. More to the point, Congress was clear in its intent that the water diverted by water management systems like SFWMD's C-11/S-9/L-33/L-37/WCA-3A is to be protected and purified through nonpoint management methods. Specifically, in 33 U.S.C. § 1314(f) Congress instructed the EPA administrator to provide guidelines and information to states for identifying

> (1) the nature and extent of *nonpoint sources* of pollutants, and (2) processes . . . from
>
> . . . .
>
> (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

(Emphasis added.)

It could not be much clearer. Pollutants flowing through such facilities as S-9 are subject to state and local controlled nonpoint source management methods of pollution control. *See* 33 U.S.C. §§ 1288, 1329, 1313(d). Yet, the Eleventh Circuit ignored this intent of Congress to make sure water management and flow diversion facilities, facilities generating no pollution on their own, are not required to be treated like an industrial or municipal polluter and obtain NPDES permits requiring expensive technology to limit effluent outflows. *See* Vergura,

supra, at 317 n.1, for Clean Water Action Plan, 63 Fed. Reg. 14,109 (Mar. 24, 1998).

Flood control and water delivery activities are traditionally performed by the states for the purpose of facilitating appropriate land uses. But with EPA having the power to control flood protection strategies, as well as other water supply and management strategies (e.g., irrigation flow) through its NPDES permitting authority, the state will lose its land use planning role. Such was never contemplated by the CWA. In fact, just the opposite is evident as "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .' 33 U.S.C. § 1251(b)." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (*SWANCC*). *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 503 (1988) (Congress espoused even earlier in the Flood Control Act of 1944 a policy of "recogniz[ing] the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control.").

Thus, Congress could not have intended, as the Eleventh Circuit has ruled, to impose EPA-controlled NPDES permitting requirements on the management of water for flood control and water supply purposes. Yet, the Eleventh Circuit's finding nevertheless "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. Such an alteration of the traditional role of the states to manage land use and water supply is an extremely important question of national dimension that calls for this Court's review.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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